Supreme Court, U.S.
FILED

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No. _____

In the
Supreme Court of the United States
October Term 2002

AGNES DE LIMA PAIVA and ANTHONY PAIVA,
Petitioners,

vs.

COUNTRYWIDE HOME LOANS, INC.,
Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Resolving a conflict among circuits, if a Rule 56 motion for summary judgment itself inadvertently presents documentary evidence sufficient as a matter of law to establish the existence of material facts in genuine dispute so as to otherwise defeat summary adjudication and to require a trial on the merits, does a district judge have a duty to consider such evidence where no timely opposition papers are however filed by opposing pro se parties?

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I. JURISDICTIONAL STATEMENT

The jurisdiction of the district court was based upon Section 1635 of Title 15 of the United States Code.

This Court has jurisdiction to review this *Petition for a Writ of Certiorari*, timely filed by U.S. Mail on April 7, 2003, within ninety days (weekends excluded) of the denial of rehearing by the court of appeals on January 6, 2003, pursuant to Section 1254(1) of Title 28 of the United States Code and Supreme Court Rules 10(c) and 13(3).

II. AUTHORITATIVE PROVISIONS

The court of appeals' unpublished Memorandum decision being challenged is set forth in the Appendix to this Petition, together with the relevant district court decisions; the relevant controlling provisions of the Truth-In-Lending Act ("TILA") contained in Section 1635 of Title 15, and the relevant controlling provisions of District of Hawaii Local Rule 56.1, are both footnoted in the text of this Petition.

III. STATEMENT OF THE CASE

Agnes and Anthony Paiva ("Paivas") are life-long Honolulu residents, and husband and wife, 75 and 82 years old respectively, and Mr. Paiva is wheel-chair bound following a stroke.[1]

Briefly, the Paivas had refinanced their principal residence on or about April 26, 1996, and — appearing *pro se* — sued Countrywide Home Loans, Inc. ("Countrywide"), a New York corporation, for rescission and for statutory damages on February 14, 2000, in the United States District Court for the District of Hawaii, alleging various Truth-In-Lending Act ("TILA") violations, including a failure to deliver to each of them two completed copies of any *Notice Of Right To Cancel*, and a failure to correctly disclose various financial credit terms of their loan, as pled by them in their *Complaint*,

[1] As this Petition was about to be printed, counsel learned that Mr. Paiva had just passed away at the end of March due to a subsequent stroke.

penned by them with the help of local non-lawyer, consumer advocates.

The Paivas had sent Countrywide a written cancellation notice on April 22, 1999, receipted for by Countrywide, demanding rescission, and that material fact was not contested by Countrywide below.

On March 6, 2001, Countrywide, after failing to have the *Complaint* initially dismissed, moved for summary judgment, and in support thereof Countrywide filed — pursuant to Local Rule 56(b),[2] which formed the basis for the lower court's granting of summary judgment, as the Paivas, still unrepresented by counsel, found themselves unable to prepare opposition papers prior to the scheduled April 30, 2001, hearing date in the format required by that Local Rule.

The Paivas were unable to file opposition papers in time for the April 30, 2001, hearing, and no hearing was therefore held.

The district court reviewed the record before it, and concluded that it could not find "any genuine issue of material fact in the record," canceled the oral hearing and granted summary judgment against the Paivas, by an *Amended Order* entered that same day, on April 26, 2001.

The Paivas, finally able to retain trial counsel on May 7, 2001, filed a Rule 59(e) motion on the grounds, *inter alia*, that although they had not filed opposition papers, the evidence presented to the district court by Countrywide itself with Countrywide's own concise statement for the summary judgment hearing showed without more that there were issues of material fact in genuine dispute.

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[2] LR 56.1(b): "*Opposition Requirements*: any party who opposes the motion shall file and serve with his or her opposing papers a separate document containing a concise statement that: (1) accepts the facts set forth in the moving party's concise statement; or (2) sets forth all material facts as to which it is contended there exists a genuine issue necessary to be litigated."

The Paivas through newly-retained counsel conceded that had Countrywide's attorneys merely presented a *prima facie* case against a TILA rescission, Countrywide would have been entitled to summary judgment in the absence of any contrary evidence having been submitted by the Paivas for the scheduled April 20, 2001, summary judgment hearing, notwithstanding perhaps their *pro se* status.

The basis of the Paivas' Rule 59(e) motion, however, was that Countrywide did much more, and actually itself presented evidence in their motion papers for the April 30, 2001, summary judgment hearing — apparently in anticipation of answering what it knew were the Paivas' counter-arguments – which actually substantiated the Paivas' TILA case.

The Paivas argued that the lower court was duty bound, perhaps not to review the entire case file, but surely to consider *all* of the evidence presented by the Movant, including the evidence which made summary adjudication in its favor improper, upon ruling, but that the district judge overlooked that evidence favorable to the Paivas, which Countrywide's attorneys had themselves submitted to the district court.

There were, for instance, evident in Countrywide's own motion papers, numerous issues of material fact in genuine dispute,[3] the most obvious of which was whether they had received two completed copies each of the requisite TILA Notice Of Right To Cancel at loan closing, Countrywide itself having submitted with its own concise statement evidence for the April 30, 2001, summary judgment hearing in the form of sworn statements made by both Mr. and Ms. Paiva under penalty of perjury, taken from their oral deposition transcripts, swearing under oath that they had not:

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[3] The other TILA issues which were never addressed below were the Paivas' contention that (1) they were forced to sign a premature waiver, and (2) that there were material mistakes in disclosure of the finance charges and the amount financed.

COUNTRYWIDE'S COUNSEL: To make sure I understand what you believe happened, you are saying in here that you did not each get two copies of the notice of the right to rescind?

MRS. PAIVA: Yes.

COUNTRYWIDE'S COUNSEL: You are claiming that you only got one copy each.

MRS. PAIVA: One copy.

COUNTRYWIDE'S COUNSEL: Is that correct?

MRS. PAIVA: Yes.[4]

* * * * *

COUNTRYWIDE'S COUNSEL: Before we try and read anything, your wife said that the claims [sic] that there were Truth in Lending violations were that there were not two copies of the Notice of Right to Rescind given to each of you, that even what information you were given about the right to rescind was not complete, and that there were two material disclosures that were not properly given – and those were the amount financed and the finance charge. Do you remember her testifying to that?

MR. PAIVA: I agree with her, what she said.[5]

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[4] Deposition of Agnes D. Paiva, October 27, 2000, page 45, lines 14-23).

[5] Deposition of Anthony Paiva, October 27, 2000, pages 21-22, lines 23-25, 1-8.

The record further substantiated that TILA violation by showing that the Paivas together had received at loan closing a total of two blank *Notices Of Right To Cancel*, found in the Paivas' production of documents, while Countrywide produced for the summary judgment hearing only one copy signed by each.[6]

IV. LEGAL ARGUMENT

This Court has long recognized that summary judgments pursuant to Rule 56 of the Federal Rules of Civil Procedure,[7] in the absence of a decision on the merits of controversies, are not favored, that a stringent burden of proof must be placed upon Rule 56 movants, and that all justifiable inferences are to be drawn in favor of opposing parties, Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); Matsushita Electric Industrial Co.. Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986).

There has, however, remained a long-standing split in the circuits for nearly three decades since this Court's 1986 decisions in Celotex, Anderson, and Matsushita concerning how those standards are to be implemented, and especially how much time and effort must a district judge devote to such summary adjudications.

For instance, is a district judge under an obligation to review the entire case file whether or not portions are

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[6] Countrywide's filed concise statement of material facts.

[7] See relevant provisions of Rule 56(c): summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." But see relevant provisions of Rule 56(e): "an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise . . . , must show that there is a genuine issue for trial."

specifically identified by the parties for a Rule 56 hearing? Or, is a district judge to limit his or her inquiry to whatever the parties submit for a Rule 56 hearing?

A. Evidence presented by a party moving for summary judgment which itself establishes the existence of material facts in genuine dispute defeats a Rule 56 motion even in the absence of opposition filings.

The Court of Appeals for the First Circuit, in Stepanischen v. Merchants Despatch Transportation Corp., 722 F.2d 922, 927-28 (1st Cir. 1983), reversing in part, held, for instance, that a district judge has an affirmative duty to look at the entire record in deciding Rule 6 motions even if opposing counsel's performance is insufficient to defeat the motion:

> We note with frustration the more and more typical phenomenon, present in this case, of a district court having to decide a motion for summary judgment without the assistance the court should expect from counsel. Stepanischen's counsel filed barely adequate summary judgment papers in district court, then suddenly revived to give this court a factually detailed, 49-page brief on appeal. The district court explicitly noted the stark quantitative and qualitative differences between the parties' summary judgment papers. In support of its motion for summary judgment, MDT filed a 27-page memorandum of law and a lengthy appendix containing affidavits from two MDT officials and excerpts of relevant deposition testimony. Stepanischen, by contrast, filed only a one-page "objection" to MDT's motion for summary judgment, a one-page cross-motion for summary judgment,

> two-page affidavit from Stepanischen. Stepanischen also expressly relied on a 10-page pretrial memorandum of law that he had already filed.
>
> The [lower] court . . . stated: . . . In the face of "unopposed facts" presented by defendant MDT, the court found that "the plaintiff's circumstantial evidence is so attenuated that, as it stands, it leads to nothing more than conjecture". The court also stated that Stepanischen's affidavit fell far short of establishing a genuine issue of material fact concerning anti-union bias.
>
> We have looked through the record in this case, including the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits". Having done so, we feel compelled to conclude that they show a "genuine issue" of "material fact".

Other courts of appeals have disagreed, including the Court of Appeals for the Ninth Circuit, the panel below reporting itself bound by such earlier circuit precedent,[8] concluding that a district judge should not be required "to scour the record for potential issues of fact to which it was not specifically referred," Memorandum at 2.[9]

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[8] Carmen v. San Francisco Unified School District, 237 F.3d 1026 (9th Cir. 2001); see also Forsberg v. Pacific Northwest Bell Telephone Co., 840 F.2d 1409 (9th Cir. 1988).

[9] Disagreeing with the Court of Appeals for the First Circuit are the Court of Appeals for the Fifth Circuit in Forsyth v. Barr, 19 F.3d 1527 (5th Cir. 1994); the Court of Appeals for the Sixth Circuit in Guarino v. Brookfield Township Trustees , 980 F.2d 399 (6th Cir. 1992); the Court of Appeals for the Seventh Circuit

While one can well appreciate the unfairness and accompanying frustration, given ever increasing federal caseloads — which has undoubtedly led to such a split of authority — that a district judge must experience, being called upon to decide a Rule 56 motion, if put in the position of being expected to independently review a voluminous record with no help from counsel, the facts in Paiva clearly are distinguishable from the type of evidentiary quagmire that produced the Carmen-Forsberg-Forsyth-Guarino-Heath-Adler contrary line of cases.

What distinguishes this case is that the Paivas were not asking the district court "to scour the record" outside of the summary judgment papers, but simply to consider the evidence in their support which Countrywide itself had already introduced into evidence in its own motion papers –self-defeating its threshold *prima facie* burden of proof.

Thus, in Carmen, *supra*, 237 F.3d at 1031, the Ninth Circuit held that a district judge did not have to independently search the entire file when reviewing summary judgment motions, yet nevertheless did not exclude denying summary judgment based on the movant's own submitted evidence itself ("we hold that the district court may determine whether there is a genuine issue of fact, on summary judgment, based on the papers submitted on the motion and such other papers as may be on file and specifically referred to and facts therein set forth in the motion papers").

Similarly, the Fifth Circuit in Forsyth, *supra*, 19 F.3d at 1537, was confronted, not with motion papers that themselves established there were material facts in genuine dispute, but were presented with solid motion papers opposed by mere "vague, conclusory assertions" in opposition.

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in L.S. Heath & Son v. AT & T Information Information Systems, 9 F.3d 561 (7th Cir. 1993); and the Court of Appeals for the Tenth Circuit in Adler v. Wal-Mart Stores, Inc., 144 F.3d 664 (10th Cir. 1998).

In accord also was the Sixth Circuit in Guarino, *supra*, 980 F.2d at 404, which did not declare that a district court should put blinders on with respect to admissions of material facts in genuine dispute found in the motion papers themselves just because not raised in opposition papers ("the facts presented and designated by the moving party were the facts at hand to be dealt with. . . . Dozens of other panels, many speaking in unpublished prisoner appeals, have dealt with the circumstances of a dispositive motion in want of a response and have consistently assumed without specific comment that a court's reliance on the facts advanced by the movant is proper and sufficient").

The Seventh Circuit in Heath, *supra*, 9 F.3d at 567, similarly, rejected the notion that a district judge must "scour the record," but in Heath the movant presented only evidence which supported summary adjudication, not evidence establishing, for instance, as here, that material TILA issues were actually in genuine dispute.

The decision of the Tenth Circuit in Adler, 144 F.3d at 671, is similarly distinguishable, for the court of appeals in Adler did not hold that summary judgment would be granted where the movant's own papers disproved the nonexistence of material issues in genuine dispute ("the movant bears the initial burden of making a prima facie demonstration of the absence of a genuine issue of material fact").

Moreover, the Paiva panel below completely misapprehended the rationale of Carmen, to which it thought it was bound, for Carmen, 237 F.3d at 1031, was expressly based upon policy considerations, favoring the shifting of Rule 56 responsibilities from the district judge to counsel and not to *pro se* litigants such as the elderly Paivas in this case:

> Rule 56 may be adequately satisfied by a lawyer designating where (outside the opposition papers) the critical evidence can be found and what it says, though ordinarily the better practice would be to photocopy and attach the evidence to

> the opposition papers. It is difficult to imagine why the respondent's lawyer would not remember or find the evidence needed to defeat the motion and show it to the judge by attaching it to the opposition papers ("the lawyer's duty").[10]

B. The Paivas were entitled to a trial on the merits of their Truth-In-Lending Act claims as a matter of law.

Congress enacted TILA in order to establish a national consumer legislative policy to curb widespread mortgage credit fraud, pursuant to the U.S. Constitution's Supremacy, Banking, and Interstate Commerce Clauses.

"The avowed purpose of the Consumer Credit Protection Act, enacted in 1968 after eight years of Congressional consideration was . . . to remedy unscrupulous and predatory creditor practices throughout the nation," N.C. Freed Co., Inc. v. Board of Governors of the Federal Reserve System, 473 F.2d 1210, 1214 (2nd Cir. 1973), *cert. denied*, 414 U.S. 827 (1973).

TILA was enacted by Congress in 1968 as Section 1601, *et seq.*, of Title 15 of the United States Code and implemented by Section 226 of Title 12 of the Code of Federal Regulations, known as Regulation Z, to protect consumers from material

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[10] Any attempt to suggest that District of Hawaii Local Rule 56.1(g) justifies ignoring evidence in the motion papers themselves which shows the existence of material facts in genuine dispute is misplaced, for that subsection of Local Rule 56.1 rules out, not consideration of evidence before the court for the summary judgment hearing from whatever source, but only a scouring of the record ("the court shall have no independent duty to search and consider any part of the court record not otherwise referenced in the separate concise statements of the parties"). Here, the evidence defeating summary judgment was in and attached to the concise statement of the moving party.

nondisclosures varying in amount by more than $35, and from failures to provide proper right-to-cancel notices, allowing borrowers to rescind loan transactions and void mortgage security interests otherwise attaching to a consumer's principal residence.

Federal law is well settled today: If the relevant dates are not filled in on the copies – two each required — of the "Notice Of Right To Cancel" form and delivered to the consumer, the consumer has the full three-year statutory period in which to rescind the loan transaction, which the Paivas did within the three-year extended rescission period; *see, e.g.*, Semar v. Platte Valley Federal Savings and Loan Association, 791 F.2d 699, 701-702 (9th Cir. 1986):

> TILA and its regulations, issued by the Federal Reserve System, 12 C.F.R. 226.1-.29 ("Reg Z"), require the lender to provide a form stating the specific date on which the three-day rescission period expires. 15 U.S.C. 1635(a);12 C.F.R. 226.23(b)(5). If the lending institution omits the expiration date and fails to cure the omission by subsequently providing the information, the borrower may rescind the loan within three years after it was consummated. 15 U.S.C. 1635(f).

The Semar holding, moreover, is representative of decisions in all circuits; *see, e.g.*: Williamson v. Lafferty, 698 F.2d 767, 768 (5th Cir. 1983); Reynolds v. D&N Bank, 792 F. Supp. 1035, 1038 (E.D. Mich. 1992); New Maine National Bank v. Gendron, 780 F. Supp. 52, 57 (D. Maine 1991); Apaydin v. Citibank Federal Savings Bank (In re Apaydin), 201 B.R. 716 (Bk. E.D. Pa. 1996); Mayfield v. Vanguard Savings & Loan Association, 710 F. Supp. 143, 146 (E.D. Pa. 1989); and Jenkins v. Landmark Mortgage Corporation of Virginia, 696 F. Supp. 1089, (W.D. Va. 1988) ("[such] violations of TILA cannot be explained away asmerely 'technical' and, thus, de minimus. . .

. this court need only look to see if there was a violation").

In the exact same, identical factual context as here, it was held, for instance, in Powers v. Sims & Levin Realtors, 396 F. Supp. 12, 22-23 (E.D. Va. 1975), *affirmed in part, and reversed in part on other grounds*, 542 F.2d 1216 (4th Cir. 1976):

> Recognizing the possibility that some creditors might try to evade the disclosure requirements of the act by keeping the receipt acknowledgments signed by their debtors, Congress legislated a rule of evidence for purposes of the Truth-In-Lending Act which states that receipt acknowledgments do no more than create a rebuttable presumption of delivery.
>
> * * * * *
>
> [C]ongressional policy, as expressed by 15 USCS 1635(c), precludes granting a creditor summary judgment on the basis of a receipt acknowledgment alone where plaintiffs deny by affidavit that they received the disclosures required by the Act. Insofar as plaintiffs' affidavits rebut the defendant's protestations of delivery, the Court cannot conclude that there is no genuine issue as to the fact of delivery which would entitle the defendant to summary judgment as a matter of law.

As a matter of settled federal law, that issue is everywhere clearly regarded at the very least as an issue for trial, notwithstanding what a borrower may have signed; *see also, e.g.*, Kicken v. Valntine Production Credit Association, 628 F. Supp. 1008 (D.C. Neb. 1984), *affirmed*, 754 F.2d 378 (8th Cir. 1984), and more recently, see the unanimous decision of the

Hawaii Supreme Court in Hawaii Community Federal Credit Union v. Keka, 94 Haw. 213, 11 P.3d 1 (2000), implementing the Semar decision in the same factual circumstances as here in Hawaii, notwithstanding the rebuttable presumption of delivery.

Thus, in Cintron v. Bankers Trust Co., 682 So. 2d 616 (Fla. App. 1996), for instance, it was held that "in their filed affidavits, the Citrons sufficiently rebutted this presumption [of delivery]," the Court reversing, citing as additional authority identical holdings from other states; see also Williams v. Gelt Financial Corp., 237 B.R. 590, 595 (E.D. Pa. 1999) (once the Debtor has provided an affidavit or testimony that he or she did not receive the documents, "it is incumbent upon . . . [the creditor] to produce some positive evidence that delivery" of the documents occurred).

And that is exactly what Countrywide's counsel did for the Paivas here, submitting to the district court in its summary judgment papers the sworn statements of the Paivas, there having sworn to the facts so stated, that they had not had delivered to them two completed copies each of the requisite *Notice Of Right To Cancel* forms, as shown in both of their Countrywide-proffered deposition transcript pages, and the district judge's conclusion that although at their sworn deposition they had been referring only to the language of their *Complaint* represents incredible sophistry.

The Paivas fully had their burden of proof satisfied ironically under federal law by the submissions of movant alone, and for that reason – based upon the Rule 56 record before the district court without any "scouring of the record" – the Paivas were clearly entitled to a trial on the merits of their TILA claims.[11]

[11] Moreover, courts treat evidence opposing summary judgment differently from that of the movant. Although district courts are supposed to carefully scrutinize materials submitted by the moving party to ensure strict compliance with Rule 56(e), the district courts are supposed to be more indulgent towards the

V. CONCLUSION

For all of the above reasons, it is respectfully submitted that this Court needs to clarify its earlier 1986 precedent, *supra*, and that the facts of this case offer a unique opportunity for the Court to do so and accordingly to provide proper guidance to district judges as to the scope of their Rule 56 responsibilities in such an important procedural area of federal law, I the interests of justice and fair play, since the pendulum has now swung too far, however understandably in the face of mounting caseloads, in the other direction from this Court's earlier holdings in Celotex, Anderson, and Matsushita.

Respectfully submitted,

/s/ Gary Victor Dubin

GARY VICTOR DUBIN
Counsel for Petitioners

Honolulu, Hawaii

April 7, 2003

towards the non-moving party; 10A *Wright and Miller*, Federal Practice and Procedure: Civil Section 2738.

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I. Amended Order Granting Defendant Countrywide Home Loans, Inc.'s Motion For Summary Judgment, filed April 26, 2001

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

AGNES DE LIMA PAIVA AND ANTHONY PAIVA,	)	CV. NO. 00-00130 SOM
	)	
	)	AMENDED ORDER
Plaintiffs,	)	GRANTING DEFENDANT
vs.	)	COUNTRYWIDE HOME
	)	LOANS, INC.'S MOTION
COUNTRYWIDE HOME LOANS, INC.,	)	FOR SUMMARY JUDGMENT
	)	
Defendant.	)	*FILED APRIL 26, 2001*

This amended order supersedes this court's order of April 25, 2001. Having received no opposition and having reviewed the record, the court finds that Defendant Countrywide Home Loans, Inc. ("Defendant") has met its burden of showing entitlement to summary judgment as a matter of law. Because the court cannot find any genuine issue of material fact in the record, summary judgment is GRANTED in favor of Defendant on all claims.

This court decides this motion without a hearing pursuant to Local Rule 7.2(d) ("The court, in discretion, may decide any motion without a hearing").

Defendant also requests leave to move for sanctions. Defendant is apparently concerned that the cutoff for dispositive motions has passed. A post-judgment motion for sanctions, even if it results in a dispositive ruling or a further judgment (which may or may not occur, depending on the nature of the sanctions), is not covered by a pretrial motions cutoff. While the court here expresses no opinion on whether sanctions should issue

Defendant needs no leave to move for sanctions. Defendant may file such a motion with this judge so that the court may determine whether to send it to a Magistrate Judge.

The clerk of court shall enter judgment in favor of Defendant.

DATED: Honolulu, Hawaii; April 26, 2001.

SUSAN OKI MOLLWAY
UNITED STATES
DISTRICT JUDGE

II. Judgment in a Civil Case, filed April 26, 2001

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

AGNES DE LIMA PAIVA AND ANTHONY PAIVA,	)	CV. NO. 00-00130 SOM
	)	
	)	JUDGMENT IN A CIVIL
Plaintiffs,	)	CASE
vs.	)	
	)	
COUNTRYWIDE HOME LOANS, INC.,	)	
	)	
	)	
Defendant.	)	*FILED APRIL 26, 2001*
	)	

This action came to trial before the Court. The issues have been tried and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of the defendant COUNTRYWIDE HOME LOANS, INC. and against AGNES DE LIMA PAIVA and ANTHONY PAIVA.

April 26, 2001 *WALTER A.Y.H. CHINN*
CLERK

III. Order Denying Plaintiffs' Rule 59(e) Motion To Set Aside Judgment, filed June 18, 2001

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

AGNES DE LIMA PAIVA AND ANTHONY PAIVA,	CV. NO. 00-00130 SOM
Plaintiffs,	ORDER DENYING PLAINTIFFS' RULE 59(e)
vs.	MOTION TO SET ASIDE JUDGMENT
COUNTRYWIDE HOME LOANS, INC.,	
Defendant.	*FILED JUNE 18, 2001*

I. INTRODUCTION.

Plaintiffs Agnes De Lima Paiva and Anthony Paiva (collectively "Plaintiffs"), proceeding pro se, filed a Complaint against Defendant Countrywide Home Loans, Inc. ("Countrywide"), on February 14, 2000. Plaintiffs sought to rescind a real estate loan transaction on the basis that Countrywide had failed to comply with the requirements of the Truth in Lending Act ("TILA"). The Complaint specifically alleged that Countrywide had violated TILA by failing to properly notify Plaintiffs of their right to rescind the transaction, and by failing, to properly and accurately disclose the "amount financed" and the "finance charge" for the transaction.

On March 6, 2001, Countrywide moved for summary judgment on all claims. Countrywide argued that: (1) it had

properly notified Plaintiffs of their right to rescind the transaction; and (2) Plaintiffs had been unable to identify any inaccuracies in the "amount financed" or the "finance charge" listed on the TILA disclosures. This court granted Countrywide's motion for summary judgment on April 26, 2001. The court found that Countrywide had met its burden of showing entitlement to summary judgment as a matter of law. The court further noted that Plaintiffs had filed no opposition to Countrywide's motion for summary judgment. Judgment was accordingly entered in favor of Countrywide and against Plaintiffs on the same date.

Plaintiffs, now represented by counsel, timely filed the present Rule 59(e) motion to set aside judgment. On this motion, Plaintiffs argue that: (1) the court erroneously ruled that Countrywide had met its burden of showing entitlement to summary judgment as a matter of law; and (2) Countrywide's counsel committed fraud upon this court by failing to disclose to this court the true facts of this case and controlling legal authority. The court denies Plaintiffs' motion.

II. BACKGROUND.

Plaintiffs' claims arose out of a loan transaction between Plaintiffs and Mortgage Lenders, Inc. ("Mortgage Lenders"). See Complaint ¶ 6. The Complaint alleged that, in this transaction, Mortgage Lenders lent $262,000 to Plaintiffs on April 22, 1996. See id. As part of the transaction, Mortgage Lenders allegedly retained a security interest in Plaintiffs' residence at 225 Kapalu Street, Honolulu, Hawaii, 96813. See id. ¶ 8. Mortgage Lenders allegedly assigned the loan to Countrywide after the transaction was completed. See id ¶ 10.

Plaintiffs claimed, in the Complaint, that they sent a letter requesting rescission of the transaction to Countrywide on April 22, 1999. See id. ¶ 15. Plaintiffs said that Countrywide received Plaintiffs' notice of rescission on April 26, 1999. See id. ¶ 17. The Complaint alleged that Countrywide thereafter failed to take any action to terminate the security interest in

Plaintiffs' residence or to return any money paid to Countrywide in connection with the transaction. See id. ¶ 19.

After almost a year, Plaintiffs, proceeding pro se, filed a Complaint in this court against Countrywide. In the Complaint, Plaintiffs requested that this court rescind the real estate loan transaction on the basis that Countrywide had allegedly failed to comply with the requirements of TILA. See id ¶ 21. The Complaint specifically alleged that Countrywide had violated TILA. by failing to properly notify Plaintiffs of their right to rescind the transaction, and by failing to properly and accurately disclose the "amount financed" and "finance charge" for the transaction. See id. ¶¶ 11-13.

On May 17, 2000, Countrywide requested documents from Plaintiffs as part of discovery in this case. See Affidavit of Mary Martin ("Martin Aff.") ¶ 5, attached to Defendants' Opposition to Plaintiffs' Motion to Set Aside Judgment. Plaintiffs did not respond to Countrywide's request for documents. See id. Defendant also noticed the deposition of Agnes De Lima Paiva on May 24, 2000. see id ¶ 6. Plaintiffs did not respond to this notice or appear for the deposition. See id.

Countrywide filed a motion to compel discovery and for sanctions on July 11, 2000. Plaintiffs did not file any opposition to this motion and did not attend the hearing on the motion before Magistrate Judge Barry Kurren on August 11, 2000. Magistrate Judge Kurren granted Countrywide's motion to compel discovery and denied Countrywide's motion for sanctions without prejudice on August 16, 2000.

On August 28, 2000, a Rule 16 scheduling conference was held with Magistrate Judge Kurren. Once again, Plaintiffs did not appear at this conference. Countrywide's counsel notified the court, at this conference, that Countrywide would be filing a motion to dismiss the case for failure to comply with a discovery order.

Countrywide filed the motion to dismiss the Complaint

with prejudice for failure to comply with a discovery order on September 5, 2000. On October 18, 2000, Plaintiffs appeared before Magistrate Judge Kurren for the hearing on Countrywide's motion to dismiss, although they had not filed any opposition. Magistrate Judge Kurren continued the hearing to allow Plaintiffs the opportunity to comply with the discovery requests.

Plaintiffs ultimately complied with the discovery requests and deposition notices. Countrywide took Plaintiffs' depositions on October 27, 2000. Because Plaintiffs complied with Countrywide's discovery requests, Magistrate Judge Kurren issued his findings and recommendation that this court deny Countrywide's motion to dismiss on November 21, 2000. This court adopted Magistrate Judge Kurren's findings and recommendation on December 14, 2000.

On March 6, 2001, Countrywide moved for summary judgment on all claims. Countrywide argued that: (1) it had properly notified Plaintiffs of their right to rescind the transaction; and (2) Plaintiffs had been unable to identify any inaccuracies in the "amount financed" or the "finance charge" listed on the TILA disclosures. This court granted Countrywide's motion for summary judgment on April 26, 2001. The court found that Countrywide had met its burden of showing entitlement to summary judgment as a matter of law. The court further noted that Plaintiffs had filed no opposition to Countrywide's motion for summary judgment.[1] Judgment was accordingly entered in favor of Countrywide and against Plaintiffs on the same date.

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[1] Plaintiffs claim that they were unable to file a timely opposition to Countrywide 's motion for summary judgment given their lack of legal training. The court notes that, although pro se pleadings are to be construed liberally, pro se litigants are nonetheless bound by the rules of procedure. Ghazali v. Moran, 46 F.3d 52, 54 (9th Cir. 1995).

Plaintiffs timely filed the present Rule 59(e) motion to set aside judgment. On this motion, Plaintiffs argue that:

(1) the court erroneously ruled that Countrywide had met its burden of showing entitlement to summary judgment as a matter of law; and (2) Countrywide's counsel committed fraud upon this court by failing to disclose to this court the true facts of this case and controlling legal authority. The court denies Plaintiffs' motion.

III STANDARD.

A. Reconsideration.

Rule 59(e) permits a district court to reconsider a previous order. See Kona Enter., Inc. v. Estate of Bishop, 229 F.3d 877, .890 (9th Cir. 2000). However, "the rule offers an extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources." id. (quotation omitted). A Rule 59(e) "motion for reconsideration should not be granted, absent highly unusual circumstances, unless the district court is presented with newly discovered evidence, committed clear error, or if there is an intervening change in the controlling law." 389 Orange St. Partners v. Arnold, 179 F.3d 656, 665 (9th Cir. 1999).

There are four basic grounds upon which a Rule 59(e) motion may be granted:

> First, the movant may demonstrate that the motion is necessary to correct manifest errors of law or fact upon which the judgment is based. Second, the motion may be granted so that the moving party may present newly discovered or previously unavailable evidence. Third, the motion will be granted if necessary to prevent manifest injustice. . . . Fourth, a Rule 59(e) motion may be justified by an intervening change in controlling law.

McDowell v. Calderon, 197 F.3d 1253, -1255 n.l (9th Cir.

1999) (quotation omitted).

B. Summary Judgment.

Summary judgment shall be granted when:

> the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed. R. Civ. P. 56(c); also Addisu v. Fred Meyer. Inc., 198 F.3d 1130, 1134 (9th Cir. 2000). One of the principal purposes of summary judgment is to identify and dispose of factually unsupported claims and defenses. Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986).

Summary judgment must be granted against a party that fails to demonstrate facts to establish what will be an essential element at trial. See id. at 323. "A moving party without the ultimate burden of persuasion at trial — usually, but not always, a defendant — has both the initial burden of production and the ultimate burden of persuasion on a motion for summary judgment." Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Cos., 210 F. 3d 1099, 1102 (9th Cir. 2000) .

In order to carry the burden of production, the moving party must either produce evidence negating an essential element of the nonmoving party's claim or defense or show that the nonmoving party does not have enough evidence of an essential element to carry its ultimate burden of persuasion at trial. In order to carry the ultimate burden of persuasion on the motion, the moving party must persuade the court that there is no genuine issue of material fact.

When a moving party fails to carry its initial burden of production, the nonmoving party has no obligation to produce anything, even if the nonmoving party would have the ultimate burden of persuasion at trial. Id. at 1102-03. If, however, a moving party carries its burden of production, the nonmoving

party must produce evidence to support its claim or defense. Id. at 1103. The nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986) (footnote omitted). The nonmoving party may not rely on the mere allegations in the pleadings and instead must set forth "specific facts showing that there is a genuine issue for trial." T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987) (quotation omitted). At least some "'significant probative evidence tending to support the complaint" must be produced. Id. (quoting First Nat'l Bank v. Cities Serv. Co., 391 U.S. 253, 290 (1968)); Addisu, 198 F.3d at 1134 ("A scintilla of evidence or evidence that is merely colorable or not significantly probative does not present a genuine issue of material fact"). "[I] f the factual context makes the nonmoving party's claim implausible, that party must come forward with more persuasive evidence than would otherwise be necessary to show that there is a genuine issue for trial." California Arch' 1 Bldg. Prods.. Inc. v. Franciscan Ceramics., Inc., 818 F.2d 1466, 1468 (9th Cir. 1987) (citing Matsushita Elec. Indus. Co., 475 U.S. at 587), cert. denied, 484 U.S. 1006 (1988); accord Addisu, 198 F.3d at 1134 ("There must be enough doubt for a 'reasonable trier of fact' to find for plaintiffs in order to defeat the summary judgment motion")

However, when "direct evidence" produced by the moving party conflicts with "direct evidence" produced by the party opposing summary judgment, "the judge must assume the truth of the evidence set forth by the nonmoving party with respect to that fact." T.W. Elec. Serv., 809 F.2d at 631. All evidence and inferences must be construed in the light most favorable to the nonmoving party. Id. Inferences may be drawn from underlying facts not in dispute, as well as from disputed facts that the judge is required to resolve in favor of the nonmoving party Id.

IV. ANALYSIS.

TILA was enacted to protect the consumer from

inaccurate and unfair credit practices, and "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit." 15 U.S.C. § 1601(a). TILA. "reflects a transition in congressional policy from a philosophy of 'Let the buyer beware' to one of 'Let the seller disclose.' By erecting a barrier between the seller and the prospective purchaser in the form of hard facts, Congress expressly sought 'to . . . avoid the uninformed use of credit.'" Mourning v. Family Publications Serv. Inc., 411 U.S. 356, 377 (1973) (quoting 15 U.S.C. § 1601).

In order to effectuate its purpose, TILA should be liberally construed in favor of the consumer. See Jackson v. Grant, 890 F.2d 118, 120 (9th Cir. 1989) (citations omitted). "Even technical or minor violations of TILA. impose liability on the creditor." Id. (citations omitted). "To insure that the consumer is protected . . . TILA. and [its] accompanying regulations must be absolutely complied with and strictly enforced." Id. (quotations and citations omitted).

TILA establishes the right of a consumer to rescind a credit transaction within a given time period. See 15 U.S.C. § 1635(a). "In a transaction subject to rescission, a creditor shall deliver two copies of the notice of the right to rescind to each consumer entitled to rescind." 12 C.F.R. § 226.23(b) (1). The notice shall be on a separate document that identifies the transaction and shall clearly and conspicuously disclose," among other things, the date that the rescission period expires. 12 C.F.R. § 226.23(b) (1) (v).

"The consumer may exercise the right to rescind until midnight of the third business day following consummation, delivery of the notice required by [12 C.F.R. § 226.23(b)], or delivery of all material disclosures, whichever occurs last." 12 C.F.R. § 226.23 (a) (3). "If the required notice or material disclosures are not delivered, the right to rescind shall expire 3 years after consummation, upon transfer of all of the consumer's interest in the property, (or] upon sale of the property, whichever occurs first." Id.

A creditor is also required to make other disclosures to the consumer, "clearly and conspicuously in writing, in a form that the consumer may keep." 12 C.F.R. § 226.17(a) (1). In particular, a creditor must disclose the "amount financed" and the "finance charge" for the transaction. 12 C.F.R. §~ 226.18(b), (d). Failure to accurately disclose this information is a violation of TILA. See id.

A. Summary judgment was properly granted in favor of Countrywide.

Plaintiffs first argue that the court erroneously ruled that Countrywide had met its burden of showing entitlement to summary judgment as a matter of law. Plaintiffs contend that Countrywide failed to meet its initial burden of production on Plaintiffs' claims that Countrywide violated TILA by failing to properly notify Plaintiffs of their right to rescind the transaction, and by failing to properly and accurately disclose the "amount financed" and "finance charge" for the transaction. According to Plaintiffs, Countrywide's own documents submitted in support of its summary judgment motion demonstrate that there are genuine issues of material fact on all of Plaintiffs' claims.

1. Plaintiffs failed to rebut the presumption that Countrywide delivered two notices of the right to rescind to each Plaintiff.

A motion for summary judgment cannot be granted simply because no opposition has been filed. See Henry v. Gill Indus., 983 F.2d 943, 950 (9th Cir. 1993). The moving party must meet its initial burden of production by demonstrating the absence of genuine issues of material fact, regardless of whether the nonmoving party has filed any opposition. See Cristobal v. Siegel, 26 F.3d 1488, 1491 (9th Cir. 1994). Countrywide met its initial burden of production on Plaintiffs' claim that Countrywide failed to properly notify Plaintiffs of their right to rescind the transaction. Countrywide submitted Plaintiffs' written acknowledgments that each of them had received two copies of the notice of their right to cancel the loan transaction.

In these written acknowledgments, Agnes De Lima Paiva and Anthony Paiva recognized that they had each received two copies of the notice of their right to cancel.[2] These written acknowledgments of receipt create a rebuttable presumption that Countrywide delivered two copies of the required notices of the right to rescind the transaction to each Plaintiff. See 15 U.S.C. § 1635(c).

Plaintiffs argue that this presumption was rebutted by statements in their depositions that were attached to Countrywide's Concise Statement of Facts. See Deposition of Agnes De Lima Paiva at 45, attached as Ex. A to Concise Statement of Facts in Support of Defendant Countrywide Home Loans, Inc.'s Motion for Summary Judgment ("Defendant's CSF"); Deposition of Anthony Paiva at 21-22, attached as Ex. B to Defendant's CSF. Plaintiffs claim that, in those sworn statements, Plaintiffs maintained that they had not received two completed copies each of the notice of right to cancel forms. Plaintiffs may well be correct that a sworn statement "averring non-delivery is sufficient to create a genuine issue of material fact as to whether the statutory presumption had been rebutted, thereby precluding summary judgment with respect to a claim based upon a debtor's assertion of non-delivery." Hawaii Cmty. Fed. Credit Union v. Keka, 94 Haw. 213, 224, 11 P.3d 1, 12 (2000) (citing Stone v. Mehlberg, 728 F. Supp. 1341, 1353-54 (W.D. Mich. 1990)). However, Plaintiffs did not produce this evidence to the court before the court ruled on Countrywide' s

[2] The Tentative Settlement Statement contains a reference to a payoff of a first mortgage loan made by Dovenmuehle Mortgage, Inc. This reference suggests that the Countrywide loan was a refinancing by a creditor other than the original creditor. Such a loan would not be exempt from the requirement that the consumer be notified of the right to rescind the transaction. 12 C.F.R. § 226.23(a), (b), and (f).

motion for summary judgment because they did not file any opposition to Countrywide's motion for summary judgment.

Once Countrywide met its initial burden of production on the motion for summary judgment, the burden shifted to Plaintiffs to produce evidence to rebut the presumption of delivery. Although Plaintiffs' sworn statements were included in the complete deposition transcripts that Countrywide had attached to its Concise Statement of Facts in support of its motion for summary judgment, the court had "no independent duty to search and consider any part of the court record not otherwise referenced in the separate concise statements of the parties." Local Rule 56.1(f). It was Plaintiffs' burden to present this evidence, and they failed to meet this burden.

Moreover, Plaintiffs' sworn statements did not actually aver nondelivery in a manner that created a genuine issue of material fact. Plaintiffs' deposition testimony merely stated that the Complaint alleged nondelivery of the required notices of right to cancel; Plaintiffs did not actually testify that they had not received the required notices. See Deposition of Agnes De Lima Paiva at 44-45; Deposition of Anthony Paiva at 21-22. Plaintiffs could not rely on the mere allegations in the Complaint to survive summary judgment. See T.W. Elec. Serv., 809 F.2d at 630. Accordingly, Plaintiffs' mere affirmation about what the Complaint alleged did not satisfy their burden of producing evidence to rebut the presumption of delivery. Summary judgment was properly awarded against them on their claims that Countrywide had not delivered two completed copies of a notice of right to cancel to each Plaintiff.[3]

[3] Plaintiffs argue that the two copies of the notice of the right to rescind produced by Plaintiffs and attached to Countrywide's Concise Statement of Facts cannot count towards the four copies of the notice of the right to rescind required to be delivered to Plaintiffs because the copies produced by Plaintiffs do not state the "specific date on which the three-day rescission period"

expired. Semar v. Platte Valley Fed. Say. & Loan Ass'n, 791 F.2d 699, 701-02 (9th Cir. 1986). Regardless of whether these two copies were inadequate under TILA, Countrywide met its initial burden of production by submitting Plaintiffs' written acknowledgments of receipt of two copies each of the notice of the right to cancel the transaction. Countrywide was not required to produce the actual notices received by Plaintiffs because the acknowledgments of receipt create a rebuttable presumption that Countrywide delivered two copies of the required notices of right to cancel to each Plaintiff. See, 15 U.S.C. § 1635 (c). Accordingly, Countrywide met its initial burden even if the court did not count the two copies of the notice of the right to rescind that were produced by Plaintiffs.

Plaintiffs also argue that any waiver of the right to rescind cannot be enforced against them because it was premature. A consumer may waive the right to rescind only if "the extension of credit is needed to meet a bona fide personal financial emergency." 12 C.F.R. §226.23(e) (1). Because it was not established by either party that there was a bona fide personal financial emergency, the court does not rely on Plaintiffs' waiver of their right to rescind. The waiver is, in any event, immaterial to the court's ruling. Plaintiffs are not entitled to rescind the transaction because they did not do so within three days of consummation. 12 C.F.R. § 226.23 (a) (3). Extension of the three-day period only occurs when "the required notice or material disclosures are not delivered." Id. As noted above, there is a rebuttable presumption that countrywide delivered two copies of the required notices of the right to rescind to each Plaintiff. See 15 U.S.C. § 1635(c). Because Plaintiffs did not rebut this presumption, the court ruled that the three-day period could not be extended by Plaintiffs. Even if Plaintiffs' waiver of the right to rescind was- - invalid, Plaintiffs could not rescind the transaction because they failed to do so within the time required under the regulations. See 12 C.F.R. § 226.23 (a) (3).

2. Plaintiffs failed to submit any evidence in support of their remaining claims.

Countrywide met its initial burden of production on Plaintiffs' remaining claims that Countrywide's disclosures of the "amount financed" and the "finance charge" for the transaction were inaccurate. Countrywide submitted evidence demonstrating that Plaintiffs had not identified any inaccuracies in the "amount financed" or the "finance charge" listed on the TILA disclosures given to them. See Deposition of Agnes De Lima Paiva at 52-56; Deposition of Anthony Paiva at 23-24. This was sufficient to establish that Plaintiffs did not have enough evidence to establish a TILA violation on their remaining claims. See Nissan Fire, 210 F.3d at 1102 (holding that, in order to carry the burden of production on a summary judgment motion, the moving party may show that the nonmoving party does not have enough evidence to carry its ultimate burden of persuasion at trial).

Plaintiffs failed to file an opposition and therefore failed to submit any evidence to support their remaining claims before this court ruled on Countrywide's motion for summary judgment. Plaintiffs now seek to introduce evidence to support their remaining claims on this motion for reconsideration. See Exhibits Re: Deposition of Agnes De Lima Paiva, attached as Ex. 8 to Plaintiffs' Rule 59(e) Motion to Set Aside Judgment. However, the "failure to file documents in an original motion or opposition does not turn the late filed documents into 'newly discovered evidence'" warranting reconsideration under Rule 59 (e). School Dist. No. 1J. Multnomah County, Or. v. ACandS, Inc., 5 F.3d 1255, 1263 (9th Cir. 1993). Because Plaintiffs failed to submit this evidence in opposition to Countrywide's motion for summary judgment, they failed to meet their burden of production. See Nissan Fire, 210 F.3d at 1103 (holding that, if a

moving party carries its burden of production, the moving party carries its burden of production, the nonmoving party must produce evidence to support its claim or defense). Accordingly, summary judgment was properly granted in favor of Countrywide on Plaintiffs' remaining claims.[4]

B. There is no Evidence in the Record to Establish the Countrywide's Counsel Committed Fraud Upon the Court.

Plaintiffs also argue that the court should set aside judgment because Countrywide's counsel allegedly committed fraud upon this court by failing to disclose to this court the true facts of this case and controlling legal authority. Fraud upon the court "must involve an unconscionable plan or scheme which is designed to improperly influence the court in its decision." Pumphrey v. K.W. Thompson Tool Co., 62 F.3d 1128, 1131 (9th Cir. 1995) (quotation omitted). Plaintiffs have submitted no evidence to establish that Countrywide's counsel committed fraud upon the court.

First, Plaintiffs argue that Countrywide failed to disclose to this court the true facts of this case. Essentially, Plaintiffs argue that it was Countrywide's duty to provide the court with evidence to support Plaintiffs' TILA claims because it was available to Countrywide. However, Plaintiffs have not established that Countrywide's counsel knew what facts counsel had that should have been presented in support of Plaintiffs' TILA claims. Plaintiffs simply argue that exhibits attached to

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[4] Plaintiffs also assert two additional TILA violations in their Rule 59(e) motion that were not alleged in the Complaint. First, Plaintiff s argue that premature waivers vi olate TILA. Second, Plaintiffs contend that Countrywide violated TILA by failing to identify the original creditor in the notice of Plaintiffs' right to cancel the transaction. Because these claims were not alleged in the Complaint, the court does not consider them here.

Plaintiffs' depositions clearly establish that Countrywide violated TILA. In their depositions, Plaintiffs did not identify any inaccuracies in the "amount financed" or the "finance charge" listed on the TILA disclosures given to them. See Deposition of Agnes De Lima Paiva at 52-56; Deposition of Anthony Paiva at 23-24. Countrywide had no duty to scour the exhibits attached to Plaintiffs' deposition in order to determine whether Plaintiffs had valid claims. Plaintiffs brought this action. It was Plaintiffs' ultimate burden to demonstrate violations of TILA, not Countrywide's. Once Countrywide met its initial burden on its motion for summary judgment, it was Plaintiffs' duty to disclose facts that would preclude summary judgment. Plaintiffs failed to do so and cannot blame Countrywide or its counsel for failing to submit this evidence.

Plaintiffs also argue that Countrywide "table-funded" the transaction and deceived the court by claiming to be an assignee of the loan rather than the original lender. Plaintiffs contend that, as the original lender, Countrywide would therefore be liable for money damages. Even if the court agreed with Plaintiffs that Countrywide was the original lender, there is no evidence in the record to suggest that Countrywide or its counsel intentionally deceived the court. Moreover, as noted above, summary judgment was appropriately awarded to Countrywide on all claims on other grounds. Accordingly, the issue of whether Countrywide was the original lender was immaterial to this court's ruling and would not justify setting aside judgment.

Finally, Plaintiffs assert that Countrywide's counsel withheld controlling legal authority from this court. The court disagrees. Plaintiffs have submitted no evidence to demonstrate that Countrywide was aware of the legal authority cited by Plaintiffs or that it deliberately withheld this authority from the court. Furthermore, the decisions cited by Plaintiffs as controlling legal authority would not have affected the decision of this court. Plaintiffs first cite Beach v. Ocwen Fed. Bank, 523 U.S. 410 (1998), for the proposition that the question of whether Plaintiffs rebutted the presumption of delivery under

15 U.S.C. § 1635 (c) is an issue for trial. However, the Court in Beach nowhere addresses this question or even discusses the rebuttable presumption under 15 U.S.C. § 1635(c). Plaintiffs have failed to demonstrate how the Beach decision is applicable to the present case. Plaintiffs also claim that Semar v. Platte Valley Fed. Say. & Loan Ass'n, 791 F.2d 699, 701-02 (9th Cir. 1986), controls the court's disposition of this case. As noted above, however, the Ninth Circuit's holding in Semar does not affect the court's decision.

Because Plaintiffs have submitted no evidence that Countrywide engaged in "an unconscionable plan or scheme which [was] designed to improperly influence the court in its decision," the court does not find, on the present record, that Countrywide and its counsel committed fraud upon the court. Accordingly, reconsideration of Countrywide's motion for summary judgment is not appropriate on this ground.

V. CONCLUSION.

Plaintiffs have failed to identify any persuasive grounds that justify setting aside the judgment. Moreover, all of the arguments raised by Plaintiffs in this motion to set aside judgment could reasonably have been raised in opposition to Countrywide's motion for summary judgment. See Kona Enter., Inc., 229 F.3d at 890 (noting that a "Rule 59(e) motion may not be used to raise arguments or present evidence for the first time when they could reasonably have been raised earlier in the litigation"). Accordingly, Plaintiffs' Rule 59(e) motion to set aside judgment is denied.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii; June 18, 2001.

SUSAN OKI MOLLWAY
UNITED STATES
DISTRICT JUDGE

IV. Memorandum [Affirming Judgment], filed December 6, 2002

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

AGNES DE LIMA PAIVA AND ANTHONY PAIVA,	)	NO. 01-16423
	)	MEMORANDUM*
Plaintiffs-Appellants,	)	
vs.	)	
COUNTRYWIDE HOME LOANS, INC.,	)	
Defendant-Appellee.	)	*FILED DECEMBER 6, 2002*

Appeal from the United States District Court

for the District of Hawaii

Susan O. Mollway, District Judge, Presiding

Submitted December 5, 2002**

San Francisco, California

Before: RYMER, THOMAS, and SILVERMAN, Circuit Judges.

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*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

**This panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

Agnes and Anthony Paiva appeal the summary judgment entered in favor of Countrywide Home Loans, Inc. and the district court's refusal to reconsider that ruling. The Paivas argue that the district court failed to review the evidence that Countrywide submitted which would, they contend, have shown a triable issue of fact as to whether each had received the number of copies of the Notice of Right to Cancel required by the Truth in Lending Act, 15 U.S.C. § 1635, 12 C.F.R. §226.23(b)(1), whether there were mistakes in the financial disclosures, and whether they prematurely waived their right to rescind. We affirm.

Countrywide's motion for summary judgment was well-supported. The Paivas filed no opposition. Countrywide's evidence showed that the Paivas had acknowledged in writing that each had received two copies of the Notice of Right to Cancel and that they had signed the waiver of their right to rescind. They pointed to no evidence that they signed the waiver of their right to rescind on originals. No errors in the interest calculation, if any, were called to the district court's attention. In these circumstances, the district court appropriately found that Countrywide met its burden of establishing that no genuine issues of material fact exist. The district court had no obligation to scour the record for potential triable issues of fact to which it was not specifically referred. Carmen v. San Francisco Unified Sch. Dist., 237 F.3d 1026, 1028-29 (9th Cir. 2001); Forsberg v. Pac. N. W. Bell Tel. Co., 840 F.2d 1409, 1417-18 (9th Cir. 1988); D. HAW. R. 56.1(f) (2002).

As the Paivas made no showing of "newly discovered" evidence, an intervening change in controlling law, or manifest errors of law or fact, the district court did not abuse its discretion in declining to grant their motion pursuant to Fed. R. Civ. P. 59(e).

AFFIRMED.

V. Order [Denying Rehearing Petition], filed January 6, 2003

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

AGNES DE LIMA PAIVA AND ANTHONY PAIVA,	)	NO. 01-16423
	)	ORDER
Plaintiffs-Appellants,	)	
vs.	)	
COUNTRYWIDE HOME LOANS, INC.,	)	
Defendant-Appellee.	)	*FILED DECEMBER 6, 2002*

Before: RYMER, THOMAS, and SILVERMAN, Circuit Judges.

On December 30, 2002, Appellants filed a motion for stay of mandate. The panel construes the motion as request for an extension of time to file a petition for panel rehearing and a petition for panel rehearing. So construed, the motion for an extension of time is GRANTED. The petition for rehearing is DENIED. Appellants' motion for stay or repeal of mandate is DENIED as moot.

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(2)

Supreme Court, U.S.
FILED
MAY 14 2003
OFFICE OF THE CLERK

No. 02-1497

In The

Supreme Court of the United States

AGNES DE LIMA PAIVA and ANTHONY PAIVA,

Petitioners,

vs.

COUNTRYWIDE HOME LOANS, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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17 pp

QUESTION PRESENTED FOR REVIEW

Whether the allegations of a Complaint should be adequate to defeat summary judgment, even in light of the fact that Petitioners filed no opposition to Respondent's summary judgment motion.

CORPORATE DISCLOSURE STATEMENT

The parent of Respondent Countrywide Home Loans, Inc. is Countrywide Credit Industries Inc., a publicly traded corporation listed on the NY Stock Exchange, symbol "CCR", and a member of the Standard & Poors 500. The company has no knowledge of any publically owned companies whose share holdings exceed 10% of the company's stock.

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Local Rule 56.1, (D. Haw.) 7

REASONS FOR DENYING THE PETITION

I. NEITHER THE RECORD NOR THE DECISION BELOW RAISE THE QUESTION PRESENTED BY THE PETITION

The true underlying premise of the pending Petition for Writ of Certiorari (the "Petition") is that the allegations of a Complaint should be adequate to defeat summary judgment, regardless of whether Petitioners opposed Respondent's summary judgment motion. The premise is not supported by the law. Additionally, given the facts of this case, where Petitioners' own admissions defeat their claims, the Petition should be denied.

The Petition, however, characterizes a simple review of the contents of the Complaint during the course of a deposition as a sworn statement of the allegations of the Complaint. The Petition omits the fact that the subject depositions (attached in their entirety to the summary judgment motion) include admissions which waive any claim based on the allegations in the Complaint. Those misrepresentations of the record should preclude the granting of the instant Petition, as the question raised by the Petition is not based on the record.

However, on the misrepresentations of the record, the Petition posits that if a deposition includes sworn statements of the accuracy of the allegations of the Complaint, and if Respondent attaches the entire deposition transcript to their motion for summary judgment, then even if the Respondent's motion is unopposed, the District Court is nonetheless bound to examine the record to determine whether any such sworn statements might be buried within the deposition, thus raising a genuine issue of fact and precluding summary judgment. On the basis of the

actual record, the District Court would also be required to simultaneously ignore any contradictory testimony in the same deposition. In this case, there is no showing that the District Court did not review and consider the entire record.

Petitioners' pro se Complaint was initially the subject of a motion to dismiss as a result of Petitioners' failure to cooperate with discovery; it was only when the court ordered the Petitioners to comply with deposition notices and document requests, on a threat of dismissal, that discovery proceeded. During the course of the depositions, in which the elderly Petitioners continued to represent themselves, the depositions included a review of the Complaint.

The Complaint alleged violations of the Truth-In-Lending Act ("TILA"), 15 U.S.C. §1635. The Petition is premised on the specific allegation of failure to deliver, to each borrower, two copies of the required Notice of Right to Cancel (the "Notice"), pursuant to 12 C.F.R. §226.23(b) (Regulation Z), in a qualified TILA transaction.[1] The alleged sworn testimony concerned whether Petitioners had each received the required two completed copies of the

[1] Contrary to the statement in footnote 3 in the Petition, the alleged TILA violation of incorrect disclosures was addressed by both the District Court (Appendix to Petition, at A15), and on appeal to the Ninth Circuit Court of Appeals (Appendix to Petition, at A20). The alleged TILA issue of signing premature waivers was addressed below, but not until the Fed. R. Civ. P. 59 motion, after summary judgment had been granted. (Appendix to Petition, at A14 and A20.) Even then, Petitioners did not submit any sworn testimony that the confirmations were signed prematurely, it is simply a presumption argued by their counsel.

Notice of Right to Cancel. The portions of the transcript cited in the Petition to show these allegedly sworn statements are taken out of context; the District Court recognized this fact and situation in its "Order Denying Plaintiffs' Rule 59(e) Motion to Set Aside Judgment, filed June 18, 2001." As stated by the court:

> Plaintiffs' sworn statements did not actually aver nondelivery in a manner that created a genuine issue of material fact. Plaintiffs' deposition testimony merely stated that the Complaint alleged nondelivery of the required notices of right to cancel; Plaintiffs did not actually testify that they had not received the required notices. . . . Plaintiffs could not rely on the mere allegations in the Complaint to survive summary judgment.

(See Appendix to Petition, at A13). This quotation from the court's ruling clearly shows that the court did review the record, which is exactly the result sought by Petitioners. It also demonstrates the context of the quotation in the Petition, and the failure to establish a genuine issue of material fact.

Petitioners' own production of documents included only two copies of the Notice. However, Respondent produced two additional copies of the Notice. Each was signed by one of the two Petitioners. The Petitioners' signatures appeared on confirmation certificates (a separate part of the Notice) in which Petitioners certified and warranted that they did not desire to exercise any right to rescind the transaction, and that they ratified and confirmed the transaction in all respects. More specifically, each signed Notice from Respondent's files included Petitioners' individual signatures, dated four days after the closing, waiving any right to rescind. During the course of the

depositions, each Plaintiff authenticated their own signature on the respective confirmation certificates. The certificates, of course, rendered moot the allegations of insufficient copies of the Notice, both for the waiver of the right, but also because they demonstrated that there had, at some point, been at least four (4) copies of the Notice. Thus, the deposition testimony completely rebutted the import of the allegations of non-delivery.

On those facts, the record does not support the question presented in the Petition. Specifically, the documentary evidence is not sufficient as a matter of law to establish the existence of material facts, as it is merely the allegations of the Complaint. Petitioners cannot rely on the mere allegations in the Complaint to survive summary judgment. *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987). Further, the allegations were rendered moot by Petitioners' own admission of the accuracy of their signatures on the documents certifying, after the initial rescission period had expired, the waiver of any right to rescission.

II. THE PROCEEDINGS IN THIS CASE ARE NOT REPRESENTATIVE OF ANY SPLIT IN THE CIRCUITS CONCERNING SUMMARY JUDGMENT PROCEEDINGS

The Petition seeks the time and attention of this Court to address a purported split in the circuits as to the time and effort required of a district judge in summary adjudications. The question as posed is "how much time and effort must a district judge devote to such summary adjudications." (Petition, at 5). However, the purported split in the circuits is demonstrated by the existence of one case from the First Circuit, *Stepanischen v. Merchants*

Despatch Transportation Corp., 722 F.2d 922 (1st Cir. 1983), in which the court allegedly held that a district judge has an affirmative duty to look at the entire record in deciding Rule 56 motions. (Petition, at 6). The Petition cites disagreement from the Fifth, Sixth and Ninth Circuits. (Petition, at 7). Petitioners' argument is disingenuous, as demonstrated by a review of the First Circuit case.

The *Stepanischen* case, written in 1983, does include the quotations included in the Petition. The record in that case showed that on summary adjudication, plaintiff provided minimal opposition to the district court, whereupon the district court granted summary judgment to defendants. 722 F.2d at 927-928. On appeal, a much more substantial brief was provided. 722 F.2d at 927. On review of all of the record presented, the appellate court reversed, providing special attention to the fact that the basic issue in the case was a question of state of mind. 722 F.2d at 928. It is the discussion thereafter which decimates the premise in the instant Petition that there is any definitive split in the circuits warranting the attention of this Court. Specifically, the court stated as follows:

> A district court might deal with the problems of the sprawling record by ordering the party moving for summary judgment to provide a list of undisputed facts, buttressed by appropriate record citations, that would entitle the moving party to summary judgment. The court could then order the opposing party to provide a counter-list of genuine, material factual issues, again with appropriate record citations, that would preclude summary judgment. And once so warned, a party's failure to comply would, where appropriate, be grounds for judgment against that party.

> [O]ther district courts faced with the recurrent problem of "ferreting through the record" have enacted local rules requiring counsel to offer the court guidance. . . . Judges might consider, for example, adopting a local rule, pursuant to Fed. R. Civ. P. 83, along the lines of Civil Rule 3(g) of the United States District Court for the Southern District of New York.

722 F.2d at 931. The *Stepanischen* court then quoted the New York rule which is almost identical to the Local Rule adopted by the United States District Court for the District of Hawaii, effective February 15, 1995 (and therefore in effect during the procedural history at issue).[2] The Local Rule in the District of Hawaii states as follows:

> (a) Motion Requirements. A motion for summary judgment shall be accompanied by a supporting memorandum and separate concise statement detailing each material fact as to which the moving party contends that there are no genuine issues to be tried that are essential for the court's determination of the summary judgment motion.
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> (b) Opposition Requirements. Any party who opposes the motion shall file and serve with his or her opposing papers a separate document containing a concise statement that:
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> 1. Accepts the facts set forth in the moving party's concise statement; or

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[2] The Hawaii Local Rule has had minor modifications which do not affect this analysis.

> 2. Sets forth all material facts as to which it is contended there exists a genuine issue necessary to be litigated.
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> * * *
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> (g) Admission of Material Facts. For purposes of a motion for summary judgment, material facts set forth in the moving party's concise statement will be deemed admitted unless controverted by a separate concise statement of the opposing party.

LR 56.1 (D. Haw.). Thus, Hawaii has already taken the steps suggested by the First Circuit in *Stepanischen* to alleviate the problems of inadequate briefing and provided adequate warning. The Hawaii rule was already in place when Petitioners here failed to even oppose the Respondent's motion for summary judgment in any manner, much less in the manner designated by the Local Rules.

The purported split in the circuits is demonstrated only by *Stepanishchen*, from which it clearly can be inferred that the court would reach a different result, had the local rules included a requirement that the opposing party must offer the court guidance to find any disputed issues of material facts. Because the Local Rules of the District of Hawaii have already incorporated that suggestion, the argument of any split between the circuits, or any need to clarify the requirements of the District Court for the District of Hawaii, lacks merit.

III. THE DECISION BELOW WAS CORRECT ON THE MERITS

The case was properly dismissed, on the merits. First, as demonstrated above, Petitioners failed to comply with the Local Rules, and, because Respondent carried its

burden on summary judgment, the motion was granted. Second, regardless of whether Petitioners could prove that they had not received two copies each of the Notice of Right to Cancel, the unrebutted fact is that they confirmed, after their three day rescission period had expired, their waiver of any right to rescind by signing the confirmations provided. They dated the documents themselves, and confirmed the writings in their depositions.

The confirmations are not subject to criticism, as they were not in the nature of the waivers which were criticized in *Rodash v. AIB Mortgage Co.*, 16 F.3d 1142 (11th Cir. 1994). Rather, Petitioners' Confirmation Certificate clearly stated in BOLD lettering:

> DO NOT SIGN UNTIL THREE BUSINESS DAYS HAVE ELAPSED.

In the confirmation certificates (a separate part of the Notice), Petitioners substantively certified and warranted that they did not desire to exercise any right to rescind the transaction, and that they ratified and confirmed the transaction in all respects. Since the mandatory rescission period had already expired, only an extended right under 12 C.F.R. §226.23(a) would have existed thereafter. A waiver of an extended right to rescind was endorsed in *Smith v. Highland Bank*, 915 F.Supp. 281 (N.D. Ala. 1996), aff'd, 108 F.3d 1325 (11th Cir. 1997). In *Smith*, the Court noted distinctions between forms of notices, and affirmed summary judgment against the borrower where the "Certificate of Confirmation" was part of one form which contained both the waiver of the right to rescind and the Notice, with language similar to the form signed by the Petitioners here, signed four days after the closing. On

that basis, the dismissal, affirmed by the Ninth Circuit Court of Appeals, was correct.

CONCLUSION

For the foregoing reasons, Countrywide Home Loans respectfully requests that the Court deny the Paivas' Petition for a Writ of Certiorari.

Respectfully submitted,

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